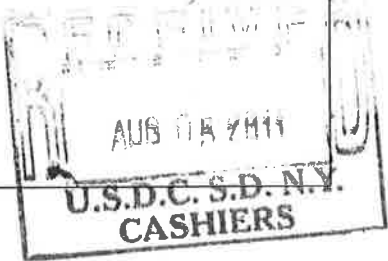


JUDGE KAPLAN

11 CIV 5457

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BURSOR & FISHER, P.A., Plaintiff, v. FEDERAL COMMUNICATIONS COMMISSION, Defendant.	COMPLAINT FOR <u>INJUNCTIVE RELIEF</u> CASE NUMBER: 
---	---

Preliminary Statement

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for injunctive and other appropriate relief for the production and release of agency records by defendant pertaining to an unredacted copy of the Declaration of Colin B. Weir (hereinafter, "Declaration"), dated June 20, 2011 and filed in WT Docket No. 11-65, which provides a comprehensive economic analysis of the market concentration of the wireless telecommunications industry and the potential impact on market concentration of AT&T Inc.'s ("AT&T") proposed acquisition of T-Mobile USA, Inc. ("T-Mobile") from Deutsche Telekom (the "Proposed Takeover"). Defendant improperly withheld these agency records from Plaintiff.

2. The Proposed Takeover is under review by various federal entities including the Federal Communications Commission ("FCC"). *See* WT Docket No. 11-65. The FCC must approve the transfer of T-Mobile's spectrum licenses to AT&T before the transaction can be consummated.

3. If approved, the Proposed Takeover would establish a 1980's-style duopoly in the nation's mobile phone industry. At present, there are four national wireless network carriers. They are (in order from the greatest number of subscribers to the fewest) Verizon Wireless

(“Verizon”), AT&T, Sprint Nextel Corp. (“Sprint”) and T-Mobile. The Proposed Takeover would combine the nation’s second and fourth largest wireless carriers, thereby eliminating one of AT&T’s low-priced competitors. In a post-takeover world, Verizon and AT&T would control more than 80% of the wireless market, and their closest competitor, Sprint, would be jeopardized as an independent carrier. Therefore, the deal raises the specter of an effective duopoly in mobile telephony, and it increases the likelihood of additional industry consolidation since Sprint’s continued existence as an independent carrier would become untenable. As a result, a myriad of problems would arise in the telecommunications industry, many of which would have a direct impact upon consumers, pricing aside.

4. On behalf of its clients, Plaintiff has sought agency records pursuant to FOIA to effectively to challenge the Proposed Takeover and meaningfully participate in FCC proceeding WT Docket No. 11-65.

5. By electronic FOIA request dated June 20, 2011 (“FOIA Request”), Plaintiff requested access to “[a]n unredacted copy of the Declaration of Colin B. Weir, filed in WT Docket No. 11-65.”

6. By letter dated July 19, 2011 (“FOIA Denial”), the FCC denied Plaintiff access to the requested information on the ground that such information was exempt from disclosure under 5 U.S.C. §§ 552(b)(4). In fact, 5 U.S.C. §§ 552(b)(4) does not apply to the requested information, and the FCC has no meritorious reason for denying Plaintiff’s FOIA Request.

7. Plaintiff has a right of access to the requested information under 5 U.S.C. § 552(a)(3). Furthermore, given the time-sensitive nature of the transactional review, and the critical nature of the economic information that was requested, it is necessary that the requested records are produced immediately so Plaintiff can meaningfully participate in the FCC

proceeding and effectively oppose the Proposed Takeover on behalf of its clients. Accordingly, this Court should order Defendant to provide the requested records to Plaintiff immediately.

Jurisdiction and Venue

8. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 701-706.

9. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) because Plaintiff's principal place of business is in New York.

Parties

10. Plaintiff Bursor & Fisher, P.A. is a law firm that represents numerous AT&T and T-Mobile non-commercial wireless customers in connection with FCC proceeding WT Docket No. 11-65 and the underlying Proposed Takeover. Plaintiff submitted the FOIA Request to defendant on behalf of its clients. Plaintiff's principal place of business, which is located at 369 Lexington Avenue, New York, NY 10017.

11. Plaintiff is the requester of the records that defendant is improperly withholding. Prompt release of the information is essential to the public interest and more specifically to the public's ability to exercise its right to participate meaningfully in the instant FCC proceeding.

12. Defendant Federal Communications Commission ("FCC") is an independent agency of the Executive Branch of the United States Government and has possession of the information that Plaintiff seeks. FCC is also an "agency" within the meaning of 5 U.S.C. § 552(f).

**Plaintiff's FOIA Request and the FCC's
Decision to Withhold the Requested Material**

13. The information requested by Plaintiff provides insight into the harmful anticompetitive impact that would result from the Proposed Takeover. While the requested data in the Weir Declaration will become publicly available next year through the FCC's annual CMRS Reports,¹ it would likely become so only after the FCC review of AT&T's application is completed, and without the public's meaningful participation in the FCC proceeding. Every day of withholding is another day of the public's right to meaningful participation being trampled. Thus, Plaintiff requires the release of the unredacted Declaration immediately.

14. Defendant's denial letter, dated July 19, 2011, states that "[the requested] information is not available to the public except pursuant to terms of the NRUF/LNP Protective Order."² Defendant's assertion is false. In fact, the information sought by Plaintiff is indistinguishable from publicly available aggregated market share information which is derived from data provided by the North American Numbering Plan Administration (NANPA) to the FCC,³ and later released in the FCC's annual CMRS Reports to Congress. Except in 2007 (when the FCC neglected to publish an annual CMRS Report), this same data has been released annually by the FCC since 2004 (initially reporting year-end 2003 HHI market concentration

¹ In 1993, Congress created the statutory classification of Commercial Mobile Services—now known as Commercial Mobile Radio Services, or "CMRS"—to promote the consistent regulation of mobile radio services that are similar in nature. At the same time, Congress established the promotion of competition as a fundamental goal for CMRS policy formation and regulation. To measure progress toward this goal, Congress required the Federal Communications Commission to submit annual reports that analyze competitive conditions in the industry. See http://wireless.fcc.gov/index.htm?job=cmrs_reports

² AT&T negotiated a NRUF/LNP Protective Order, DA 11-711 in Docket No. 11-65 ("Protective Order"), with the FCC in connection with the FCC's review of the underlying transaction, and in furtherance of the acknowledged right of the public to participate in the FCC proceeding in a meaningful way. The Number Resource Utilization Forecast (NRUF) and Local Number Portability (LNP) data information is separate and distinct from the information sought by Plaintiff in its FOIA Request.

³ See NANPA North American Numbering Plan Numbering Resource Utilization/Forecast Guidelines (5.0), January 21, 2011.

data).⁴ Mr. Weir's Declaration includes the same aggregated market concentration data, calculated using the same methodology and underlying data as used by the FCC to prepare its annual CMRS report. In sum, the redacted information from Mr. Weir's Declaration is the same type of information already available to the public. However, Mr. Weir's calculations reflect the most current and relevant market concentration levels (as of mid-year 2010), rather than year-end 2009 information which is available to the public in the FCC's 15th CMRS Report, dated June 27, 2011.

15. As further rationale for denying Plaintiff's request, defendant stated in the FOIA Denial that "the data contained in the document you request contains disaggregated, carrier-specific forecast and utilization data." As a result, defendant determined that the requested information was confidential commercial information covered by FOIA exemption 5 U.S.C. § 552(b)(4). This is also false. The data contained within Table 1 of the Declaration provides *only* aggregated, non-carrier-specific market concentration data. Mr. Weir's calculations—identical to those calculations made by the FCC in its publicly available annual CMRS reports—eliminate all carrier specific data, and aggregate the underlying county-specific data by economic areas which encompass more than one county.⁵ It is impossible to "reverse engineer" the underlying carrier specific, county-by-county data, except in the rare circumstance when there are only two carriers in a single economic area, which would provide the only situation where a determination of a single carrier's market share in that economic area is even remotely decipherable. Regardless, Plaintiff is not requesting carrier-specific, county-by-county NRUF/LNP data,⁶ but

⁴ *Supra*, at Note 1.

⁵ See Redacted Declaration of Colin Weir, Attached as Exhibit 1.

⁶ Number Resource Utilization Forecast (NRUF) data lists the total number of phone numbers in service by a specific carrier on a county-by-county basis. Local Number Portability (LNP) data pertains to

rather summary market concentration data for larger economic areas that has been aggregated using the same calculation that is used by the FCC to produce publicly available market concentration data on an annual basis. If defendant asserts that Mr. Weir's HHI⁷ calculations are carrier-specific, then it bears the insurmountable burden of demonstrating how a specific carrier's market share may be gleaned from his aggregated HHI calculations.

16. The redacted portions of the Declaration, specifically the HHI information contained within Table 1, contain information that will become publicly available through the FCC's next annual CMRS Report in 2012, likely after the FCC has determined the fate of AT&T's application in connection with the Proposed Takeover. In Table 1 of the Declaration, the column designated "2008 HHI" reveals already publicly available information provided by the FCC. Specifically, the FCC complied data submitted through NANPA to calculate HHI, a widely accepted measure of anticompetitive risk based upon the market share of the top four companies within a given economic area. Like the 2008 data, the FCC also released HHI data for 2009 as part of its latest annual CMRS Report to Congress, dated June 27, 2011. The 2010 HHI data is set to be released next year. However, Mr. Weir was able to utilize the most current and most relevant NRUF/LNP data provided to him pursuant to the Protective Order to compute HHI data for 2010 (as indicated in Table 1 of the Declaration; column "2010 HHI").⁸ Defendant

specific telephone numbers transferred to and from different carriers, on a county by county basis. In combination, these two data sets permit market share calculations.

⁷ Market concentration is measured by the Herfindahl-Hirschman Index ("HHI"). Under the 2010 Horizontal Merger Guidelines, markets with an HHI of below 1500 are "unconcentrated" markets with an HHI between 1500 and 2500 are "moderately concentrated" and markets with an HHI above 2500 are "highly concentrated." Mergers that cause an increase of 200 or more points in highly concentrated markets raise an inference of enhanced market power. In order to calculate HHI for a specific economic area, one must identify the top four firms by market share within that area. The formula is $a^2 + b^2 + c^2 + d^2 = \text{HHI}$, where "a" represents the market share of the largest firm in a particular economic area and "d" represents the market share of the fourth largest firm in a particular economic area.

⁸ Notably, on May 9, 2011, four attorneys at Plaintiff sent to defendant signed Acknowledgments of Confidentiality to gain access to the relevant NRUF/LNP data pursuant to the Protective Order. On the

will publish the same information to the public, likely after a decision on the Proposed Transaction would be finalized without the public's meaningful participation in the FCC proceeding.

17. In Table 1 of the Declaration, under the column designated "Pro Forma HHI," Mr. Weir utilized the same LNP/NRUF data provided by the FCC, to project post-merger market concentration. Thus, the formula utilized combines AT&T and T-Mobile's market share into one single market participant within each economic area.⁹ The remaining data in Table 1 tracks changes in HHI pre- and post-merger and indicates whether these changes and overall market concentration present a level of anticompetitive concern as measured by the 2010 Horizontal Merger Guidelines. This information is critical to any meaningful analysis of the Proposed Takeover.

18. The underlying carrier-specific market share within a specific county in an economic area reported in Table 1 of the Declaration is impossible to "reverse engineer." Only in economic areas with two or fewer carriers could carrier-specific market share data be gleaned at the economic area level. With at least three carriers in the bulk of the economic areas, and in most cases many more, having knowledge of the market share of one of those carriers would not reveal the market share of any remaining carriers. Furthermore, any economic area with two or fewer carriers could be easily segregated from the vast majority of economic areas with three or more carriers.

date of this filing, defendant informed Plaintiff by telephone that it would not grant Plaintiff access to this data.

⁹ For example, if AT&T had the largest market share in a particular economic area and T-Mobile has the second most market share in that same economic area, then the formula utilized would be $(a^2 + b^2) + c^2 + d^2 + e^2$, where "e" represents the market participant with the fifth largest market share in that economic area.

19. It is an extremely rare circumstance to find only two carriers within a single county, let alone an entire economic area. If necessary and proper, in that rare circumstance, the data from any two-carrier economic area may be withheld from the vast majority of the data from economic areas having three or more carriers, which must be published pursuant to FOIA.

20. AT&T advocated for the use of this market-specific market share data as a method to justify the Proposed Takeover. Just after the announcement of the transaction, the Wall Street Journal reported that AT&T proposed a market-by-market analysis of the merger, “AT&T, however, is pushing for the industry to be looked at market by market—essentially city by city—where it argues the industry is for the most part fiercely competitive and has become more so recently with the rise of low-cost carriers and newer providers of fourth generation wireless services.”¹⁰ Any such analysis requires the availability of current market-by-market concentration data as contained in Mr. Weir’s Declaration.

21. Not only should Mr. Weir’s unredacted Declaration be made available to Plaintiff, but it is arguable that the underlying data used in making these calculations should be publicly available too. Telephone numbers are a limited public resource and the public should be entitled to know how companies are stewarding this public resource. Calling such data confidential would be analogous to the government providing public access to America’s national parks, but not providing information about where they are located. Nevertheless, Plaintiff only requests the aggregated data in the Weir Declaration in this case.

22. The calculations in the Weir Declaration do not provide any insight into market share held by a specific telecommunications carrier. To the contrary, they provide meaningful and essential information as to the overall market share in large economic areas throughout the United States. This information, which cannot be “reverse engineered,” will be essential in the

¹⁰ See “T-Mobile Deal Faces Antitrust Barriers,” Wall Street Journal, March 21, 2011.

analysis of the anticompetitive effect of the Proposed Takeover. Even AT&T, the very entity that seeks the FCC's approval of the Proposed Takeover, admitted in front of a congressional panel that the merger should be analyzed at the level of local markets.¹¹ Denying access to this essential information, the dissemination of which poses absolutely no harm to any telecommunications carrier, would deny Plaintiff and the public an opportunity to rightfully utilize essential information to challenge the anticompetitive effects of the Proposed Takeover and meaningfully participate in the FCC proceeding.

Cause of Action

23. Plaintiff restates and incorporates by reference the allegations of paragraphs 1 to 20 of this Complaint, as if fully set forth herein.

24. Defendant FCC has wrongfully withheld agency records requested by Plaintiff.

25. Plaintiff and the general public will suffer immediate and irreparable harm if Defendant is permitted to deny disclosure of the unredacted Declaration, in violation of the Freedom of Information Act, 5 U.S.C. § 552(a)(3).

26. Plaintiff is entitled to injunctive relief requiring immediate processing and release of the requested records pursuant to 5 U.S.C. § 552(a)(4)(B).

¹¹ <http://online.wsj.com/article/SB10001424052748703730804576317110083164154>.

Requested Relief

WHEREFORE, Plaintiff requests this Court:

- A. order Defendant to immediately provide Plaintiff with all requested records;
- B. order Defendant to promptly disclose the requested records in their entirety, and make copies available to Plaintiff;
- C. provide for expedited proceedings in this action;
- D. award Plaintiff its costs and reasonable attorneys' fees incurred during the administrative proceedings and in this action, as provided in 5 U.S.C. § 552(a)(4)(E); and
- E. grant such other and further relief as may deem just and proper.

Dated: August 5, 2011.

Respectfully submitted,

BURSOR & FISHER, P.A.

By:



Joseph I. Marchese

Scott A. Bursor (SB1141)
Joseph I. Marchese (JM1976)
369 Lexington Avenue, 10th Floor
New York, NY 10017
Tel: 212-989-9113
Fax: 212-989-9163
E-Mail: scott@bursor.com
jmarchese@bursor.com